(3)

No. 06-0695

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In The
Supreme Court of the United States

ROBAMA ABED and MARY ABED,

Petitioners,

v.

MARY K. HIGGINS as Independent Executrix of the Estate of J. MARLON HIGGINS, also known as JAMES M. HIGGINS, RUSTY HIGGINS and JAMES MARLON HIGGINS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBAMA ABED, Pro Se
MARY ABED, Pro Se
Petitioners
3893 South Quince Street
Denver, CO 80237
(303) 770-4667

QUESTION PRESENTED

Whether the Colorado Courts violated the Petitioners' right to a jury trial as provided by the rules of the common law and as guaranteed by the United States Constitution pursuant to Amendment VII and Amendment XIV, in that the Colorado Courts sanctioned the violation of jury secrecy by allowing an alternate juror, a stranger to the jury proceedings, to participate in reaching a verdict in which the Petitioners were plaintiffs and Respondent was defendant, and whether the lack of contemporaneous objection by Petitioners constituted a waiver of any error that occurred.

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OPINIONS BELOW

The Unpublished Opinion of the Colorado Court of Appeals in that Court's Case No. 04CA1268, announced March 30, 2006, affirming the judgment of the District Court of the City and County of Denver, Colorado in Case No. 02 CV 4629 is printed at Appendix "A" to the Petition. Order denying Petition for Rehearing by the Colorado Court of Appeals, dated June 1, 2006, is printed at Appendix "B" to the Petition. Order denying Petition for Writ of Certiorari to the Colorado Supreme Court is dated August 28, 2006, and is printed at Appendix "C" to the Petition. The appendices are part of the Petition for Writ of Certiorari.

JURISDICTION

The Respondent's statement of lack of jurisdiction is based on lack of contemporaneous objection by the Petitioners when the jury retired to consider the case. The affidavit of counsel for Petitioners (Appendix "G" to the Petition for Writ of Certiorari), explains the reason for lack of objection. Furthermore, waiver, when it occurs should be expressed on the record or in writing.

STATUTES INVOLVED

There are no federal statutes involved in this Petition for Writ of Certiorari. The statutes of the State of Colorado which ensured a jury pursuant to the Seventh and Fourteenth Amendments of the United States Constitution are C.R.S. 13-71-103 (jury in civil cases shall consist of six persons, unless parties agree to a smaller number, which shall be not less than three), is printed at Appendix "D" to

the Petition; C.R.S. 13-71-142 (providing for discharge of alternate jurors), is printed at Appendix "E" to the Petition.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contained in the Petition for Writ of Certiorari is confined to the facts relevant to the question presented for review by the Supreme Court. The Respondent's Statement of the Case expands the statement beyond facts relevant to the question presented for review. The jury did determine that Respondent's driver's negligence did not cause Petitioners' injuries in spite of the overwhelming evidence to the contrary including medical evidence from Respondent's own medical experts.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT DOES HAVE JURISDICTION, AND WAIVER OF A FUNDAMENTAL RIGHT MUST BE KNOWINGLY AND WILLINGLY MADE.

The affidavit of attorney Remigio Pete Reyes, Petitioners' trial counsel, (Appendix "G" to the Petition for Writ of Certiorari), sufficiently answers the issue raised by Respondent in her Opposition Brief, that the Petitioners failed to object contemporaneously to the alternate juror participating in the jury deliberations. For two centuries the Supreme Court of the United States has held that trial by jury being a fundamental right, every reasonable presumption should be indulged against waiver. ***Hodges v. Easton***, 106 U.S. 408, 1 S.Ct. 307, 16 Otto 408, 27

L. Ed. 169 (1882), ***Aetna Insurance Co. v. Kennedy Use of Bogash***, 301 U.S. 389, 57 S.Ct. 809, 81 L. Ed. 1177 (1937). The waiver claimed by Respondent in her Opposition Brief did not occur because there is no claim by Respondent that such waiver was knowingly and voluntarily made. Waiver of a fundamental right occurs only when knowingly and voluntarily made. ***U.S. v. Robinson***, 8 F.3d 418 (7th Cir. 1993).

The issue that is before this Court was raised in the state courts and every level. The issue was not raised for the first time on appeal. It was raised in the trial court by a motion for new trial or for judgment notwithstanding the verdict. (Appendix "F" to the Petition for Writ of Certiorari, Item 6). It must also be remembered that the Court, not counsel, is in charge of the trial proceedings. If the Rule of Law which is so basic to American Jurisprudence applies at all, it must most definitely apply to the Courts.

II. THE QUESTION TO BE ANSWERED BY THE SUPREME COURT DOES PRESENT AN ISSUE INVOLVING THE UNITED STATES CONSTITUTION WHICH SHOULD BE RESOLVED TO GIVE GUIDANCE TO ALL LOWER COURTS, FEDERAL AND STATE.

The Petitioners do not concede that Amendment VII does not apply to state courts. While the Supreme Court has been reluctant over time to apply the first Eight Amendments of the Constitution to the states, the Court has over time reversed itself with respect to the Fourth and Sixth Amendments. In view of the holdings in ***Mapp v. Ohio***, 367 U.S. 643 (1961), and ***Gideon v. Wainwright***, 372 U.S. 335 (1963), there is no logical reason why the Seventh Amendment should not be made applicable to

state court civil proceedings. The Seventh Amendment should not be relegated to orphan status among the first Eight Constitutional Amendments which provide fundamental rights to the people.

III. JURY SECRECY IS OF PARAMOUNT IMPORTANCE IN PRESERVING THE INTEGRITY OF THE JURY SYSTEM, AND AN ALTERNATE JUROR IS LIKE ANY OTHER STRANGER IN THE JURY ROOM.

The cases cited by Petitioners in the Petition for Writ of Certiorari leave no doubt whatever of the importance of maintaining jury secrecy. The cases strongly support the principle that jury deliberations should remain private and secret in every case. There is no need to cite those cases here again. It is important to state that it is an affront to the sanctity of jury proceedings to entertain the notion the question presented in this Petition for Writ of Certiorari is not of general importance as stated by Respondent in her Opposition Brief. The very presence of the alternate juror in the jury room during deliberations is like the presence of any stranger, and destroys the sanctity of those deliberations. ***United States v. Beasley***, 464 F.2d 468, 469-470 (10th Cir. 1972).

IV. COLORADO LAW ALLOWS FOR ALTERNATE JUROR PARTICIPATION IN JURY DELIBERATIONS WHEN PROVIDED BY LAW, AGREEMENT OF THE PARTIES OR BY ORDER OF THE COURT, AND NOT OTHERWISE.

The applicable Colorado statute, C.R.S. 13-71-142 (Appendix "E" to Petition for Writ of Certiorari) provides clearly that an alternate juror shall be discharged at the

time that the jury retires to consider its verdict, unless otherwise provided by law, by agreement of the parties, or by order of the court. When would participation by the alternate juror in jury deliberations be provided by law or by order of the court? That question is answered by the statute in the language which states: "An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict . . . " There is no claim in Respondent's Opposition Brief that there was agreement of parties, order of the court or a requirement of the law that the alternate juror participate in the jury deliberations in the instant case. In the one Colorado case where it was held that it was proper for the case to be submitted to a jury of seven, there was a stipulation to that effect by the parties. ***Walford v. Blinder, Robinson & Co., Inc.***, 739 P.2d 620 (Colo. App. 1990), cited by Petitioners and by Respondent. That case is quite distinct from the situation in the instant case.

V. PETITIONERS' EQUAL PROTECTION CLAIM IS PROVED BY THE FACT THAT ONLY ONE COLORADO APPELLATE CASE HAS INVOLVED THE ISSUE OF PARTICIPATION BY A SEVENTH JUROR.

The very fact that the only Colorado appellate court case involving a seventh juror is the one cited above, shows that the Colorado courts enforce the relevant statutes requiring that juries consist of six jurors, not less than three, (C.R.S. 13-71-103), and that the alternate juror shall be discharged when the jury retires to consider the verdict. (C.R.S. 13-71-142). When the trial court in the instant case failed to discharge the alternate juror as the

Colorado courts do, then it violated Petitioners' equal protection rights under the Fourteenth Amendment. That can be the only logical conclusion from that evidence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBAMA ABED, Petitioner, Pro Se
MARY ABED, Petitioner, Pro Se
3893 South Quince Street
Denver, CO 80237
(303) 770-4667